No. 14-449 SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR RESPONDENT JONATHAN D. CARR

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether Jonathan Carr's constitutional right to a "reasoned, individualized sentencing determination based on [his] record, personal characteristics, and the circumstances of his crime," *Kansas* v. *Marsh*, 548 U.S. 163, 174 (2006), was violated when the trial court declined to sever the sentencing proceeding of his capital trial from that of his brother.

2. Whether jury instructions that repeatedly emphasize the jury's obligation to make findings as to both aggravating and mitigating circumstances, repeatedly instruct that the jury must "weigh" those circumstances, and repeatedly identify the evidentiary standard for aggravating circumstances as "beyond a reasonable doubt" while remaining wholly silent as to the defendant's burden of proof regarding mitigation evidence, are reasonably likely to confuse the jury and prompt it to disregard relevant mitigation evidence in violation of the Eighth Amendment.

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INTRODUCTION

The Carr brothers' crimes remain notorious in Kansas. The brothers were paired throughout trial and the judicial fate of one has been inextricably linked to the fate of the other. Their counsel strove to separate them at both the guilt phase and penalty phase of their capital trial, and for good reason in light of their opposing strategies. Jonathan Carr, the little brother, repeatedly tried to escape the prejudicial shadow cast by his big brother's actions and his demeanor before a jury deliberating between life and death.

This Court has set a high bar for accuracy and reliability in penalty phase proceedings. The Eighth Amendment requires juries to impose an individualized sentence and it further prohibits any substantial risk that the jury's decision to impose a death sentence rests upon improper considerations. Although the question of when trial courts must sever penalty phase proceedings is a novel one before this Court, it warrants a straightforward application of these same precedents that demand accuracy and reliability. Here, that high standard has been met: Jonathan Carr's penalty phase proceeding was indelibly and prejudicially affected by the State's constant association of Jonathan Carr with his brother.

The Kansas Supreme Court properly held that there was a substantial risk that the jurors could not reasonably make an individualized determination between life and death in the "maelstrom" of evidence about the brothers' culpability, history, and characteristics, especially where the prosecution seized every opportunity to paint the brothers with the same brush. The Kansas court's logic is sound: namely, that the prosecution's sweeping, collective presentation of the Carr brothers to the jury risked grave in-

accuracy where accurate and reliable individualized analysis is required.

STATEMENT OF THE CASE

Background

1. *The Guilt Phase.*

The Kansas Supreme Court concisely summarized the relevant background of the guilt phase of this capital case:

"[Reginald and Jonathan Carr] were jointly charged, tried, convicted, and sentenced for crimes committed in a series of three incidents in December 2000 in Wichita." Pet. App. 91.

"In the first incident on December 7 and 8, Andrew Schreiber was the victim. The State charged R. Carr and J. Carr with one count of . aggravated battery, and one count of criminal damage to property. The jury convicted R. Carr on all counts and acquitted J. Carr on all counts." Pet. App. 92.

"In the second incident on December 11, Linda Ann Walenta was the victim. The State charged R. Carr and J. Carr with one count of first-degree felony murder. The jury convicted both men." *Id.*

"In the third incident on December 14 and 15, Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims of an invasion at the men's Birchwood Drive home that led to sex crimes, kidnappings, robberies, and, eventually, murder and attempted murder." *Id.*

"The State charged R. Carr and J. Carr with eight alternative counts of capital murder, four based on a related sex crime under K.S.A. 21-3439(a)(4) and four based on multiple first-degree premeditated murders under K.S.A. 21-3439(a)(6); one count of attempted

first-degree murder; five counts of aggravated kidnapping; nine counts of aggravated robbery, eight of which were alternatives, four based on use of a dangerous weapon and four based on infliction of bodily harm; one count of aggravated burglary; 13 counts of rape, eight of which were based on coerced victim-on-victim sexual intercourse and one of which was based on a victim's coerced self-penetration; three counts of aggravated criminal sodomy, two of which were based on coerced victim-on-victim oral sex; seven counts of attempted rape, six of which were based on coerced victim-on-victim overt acts toward the perpetration of sexual intercourse; one count of burglary; and one count of theft. The State also charged R. Carr and J. Carr with one count of cruelty to animals because of the killing of Holly G.'s dog. The jury convicted R. Carr and J. Carr on all of the charges arising out of the Birchwood incident." Pet. App. 92-93.

Motions to Sever at the Guilt Phase. Jonathan and Reginald Carr each moved to sever his trial from that of his brother multiple times before and during the trial. See Pet. App. 36, 188-209. The primary ground for these motions was that the defendants would present "antagonistic defenses." *Id.* at 189, 191-92. Initially, in a pretrial proceeding, "[t]he prosecutor recognized the danger for prejudice in a joint trial and suggested that two juries could be impaneled." *Id.* at 192. Later, the prosecutor "repeated her proposal but said she was not advocating for severance." *Id.* at 193. The trial court denied the motion with leave to refile. *Id.*

The motion to sever was renewed on several occasions during the trial and each time denied. Pet. App. 197. For example, Jonathan Carr's counsel renewed the severance motion when the trial judge ordered that Reginald Carr wear "leg and hand re-

straints in the courtroom during the guilt phase of the trial." *Id.* at 199. Counsel "argued that R. Carr's misconduct would prejudice his client." *Id.* See also *id.* (Jonathan Carr's counsel states that the trial judge is "probably tired of hearing it, but Reginald Carr continues to infect our right to a fair trial."). The judge took steps to shield Reginald Carr's shackles from the jury, but did not otherwise rule on the severance motion. *Id.* at 200.

On appeal, the Kansas Supreme Court found that "there is no question that the defendants had antagonistic defenses, and the State concedes this point." Pet. App. 205.

> R. Carr argued that J. Carr committed the Birchwood crimes with another person. J. Carr's counsel emphasized the relative weakness of the evidence against his client in the Schreiber and Walenta incidents and consistently stressed the evidence of R. Carr's guilt in the Birchwood incident. Each defendant did his best to deflect attention from himself on the Birchwood crimes by assisting in the prosecution of the other.

Id. But, the court nonetheless declined to hold that the trial court's abuse of discretion resulted in prejudice requiring reversal. *Id.* at 213. The court found that the State's "independent case against R. Carr was overwhelming," detailing the evidence against him. *Id.* at 211. Thus, the court concluded that "the State presented compelling evidence of R. Carr's guilt, all of which would have been admissible in a severed trial." *Id.* at 213.

In its separate opinion addressing Jonathan Carr's challenge to the denial of severance, the court stated that the majority "agrees that any error on this issue was not reversible standing alone for [the] reasons

explained in the R. Carr appeal." Pet. App. 28. Although the court did a substantial analysis of why the denial of the motion to sever had not prejudiced Reginald Carr, *id.* at 209-13, it did not separately explain why Jonathan Carr did not suffer prejudice, *id.* at 28.

2. *The Penalty Phase.*

Both defendants unsuccessfully renewed their motions to sever after their capital convictions and before the penalty phase of the trial. Pet. App. 472.

Shackling. At the beginning of the penalty phase, the trial judge indicated that standard procedure required the shackling of convicted capital defendants. The judge explained that while "there's been nothing that would indicate misconduct on behalf of Mr. Jonathan Carr at all in any of the proceedings [that he had been] involved in [t]he sheriff's procedures, [regarding security] ought to be followed." J.A. 57 (Tr. Vol. 41A at 5). The judge took measures to ensure that the jury could not observe Jonathan Carr's shackles. *Id.* at 57-59 (Tr. Vol. 41A at 6-7).

Reginald Carr, however, refused to conceal his shackles. *Id.* at 59 (Tr. Vol. 41A at 7) ("Mr. Greeno, I understand your client will not put the sweater over his handcuffs."). The judge stated that if the jury sees the shackles, Reginald Carr had "invited it," referring to the prejudice flowing from visible shackling. *Id.* See also *id.* ("it's made known to the jury, he's the one that broadcast it, then"). There was no discussion of the effect of Reginald Carr's visible shackling on the jury's perception of Jonathan Carr, who wished to continue to conceal his shackles from the jury.

The State's Case for Death. For each brother, the State asserted the same four aggravating factors in

support of the death penalty. The State charged that the brothers (i) "knowingly or purposely killed or created a great risk of death to more than one person," (ii) "committed the crime[s] for their own self or for another for the purpose of receiving money or any other thing of monetary value," (iii) "committed the crime[s] in order to avoid or prevent lawful arrest or prosecution," and (iv) "committed the crime[s] in an especially heinous, cruel and atrocious manner." *Id.* at 49 (Tr. Vol. 40 at 33). As support, the State put into evidence the guilt phase trial record in full. *Id.* at 73-74 (Tr. Vol. 41A at 35).

As described in detail *infra* at 26-30, the theme of the State's penalty phase presentation was that Jonathan and Reginald Carr were a single entity, equally culpable for the horrific crimes that were committed, equally sociopathic and dangerous by virtue of their genetics and upbringing, and equally deserving of the death penalty. The State's opening argument focused on the "heinous ideas and depraved conduct of Jonathan and Reginald Carr together. Together." J.A. 66 (Tr. Vol. 41A at 16). And the State's closing linked Reginald Carr's sociopathy and future dangerousness to Jonathan Carr:

> Dr. Woltersdorf indicated that after giving psychological testing to Reginald Carr, that he was an antisocial personality, otherwise known commonly as a sociopath, opportunistic, self-indulgent. That is who you are sitting in judgment of, uncaring individuals. They beg you today for sympathy. They do. They are begging one of you, just one, because that's all they need.
>
> They want to get that sympathy by suggesting that their excuse is to deflect the responsibility. They want to beg you for sympathy because of that rough childhood.

Id. at 437 (Tr. Vol. 46 at 186-87).

Mitigation Evidence. The brothers each presented mitigation cases. In both, defense witnesses testified about the defendants' "dysfunctional upbringing and their psychological profiles." Pet. App. 448.

The defendants' mother, Janice Harding, testified that she and their father, Reginald, Sr., were 16 and 17 years old when their first child, Temica, was born. When Janice turned 18, she and Reginald were married, and they had three more children, Reginald, Regina and Jonathan. All were born prematurely. *Id.* The brothers were "always real close," and Jonathan "looked up to" Reginald. *Id.*

Regina died of cancer before she was three, and Janice testified that "the family deteriorated" after Regina fell ill. *Id.* Janice "fell out" with her mother-in-law after the latter reported to child protective services that she saw bruises on Regina's legs, arms and chest. *Id.* at 448-49. After Regina's death, Janice and Reginald, Sr. began "drinking heavily and fighting." *Id.* "Temica testified that she saw her father beat her mother with a stick." *Id.* In addition, Janice regularly disappeared for several days, sometimes leaving her children alone in the house. *Id.*

Janice and Reginald, Sr. separated when Reginald was 5 or 6 and divorced shortly thereafter. Reginald, Sr. lost all meaningful contact with the children. *Id.* at 450. And after the divorce, Janice "was not available to her children." *Id.* at 451. She was either absent from the home or "hol[ed] up" in her bedroom with her future husband. *Id.* Periodically, the children were shipped off to live with relatives and did not see their mother for months at a time. *Id.*

During their childhood, Janice physically disciplined her children. They "described that their moth-

er's whippings with a belt or extension cord would leave them with welts, bruises and blood blisters on their backs, legs or buttocks." *Id.* at 453. The children were required to hold each other down for punishment. *Id.*

In addition, Janice testified that she and Reginald, Sr. used marijuana and cocaine. The children were aware of their parents' excessive alcohol use and their drug use. *Id.* at 454. The parents and other relatives gave alcohol to the children early: Jonathan had Thunderbird wine mixed with Kool-Aid at age 8. The boys would drink with their uncle weekly and "get drunk." *Id.* at 455. Jonathan Carr "first smoked marijuana at age 13 with" Reginald Carr. *Id.* "They would smoke blunts, cigar-like rolls of marijuana, 'every day, all day.'" *Id.* Jonathan also described "smoking 'wet'—tobacco or marijuana cigarettes dipped in a mixture of PCP 'and typically embalming fluid'—at age 19." *Id.* Reginald Carr was selling drugs by age 13, and drinking heavily by age 16 (when Janice kicked him out of the house). *Id.*

Both Jonathan and Reginald Carr suffered childhood sexual abuse. There was testimony that both "were forced to have oral sex with [their] mother's boyfriends." *Id.* at 456. Temica thought at least Reginald was aware that her father had sexually abused her. *Id.* Jonathan Carr began having sexual contact at around age 6 or 7. *Id.* Both boys had sexual contact with a cousin starting when she was 7 and Reginald was 9. *Id.* at 457.

Jonathan Carr had difficulty in school; among other issues he was dyslexic. *Id.* at 463. While in school, he would try to disguise his inability to read. *Id.* When Jonathan Carr was in third grade, a girl accused several boys, including Jonathan, of raping her. Jonathan's name was mentioned in the newspaper,

and he was bullied as a result. *Id.* at 457. Thereafter he was sent to live with his aunt. *Id.* at 458. He became so despondent that "he tried to hang himself." *Id.* This was not Jonathan Carr's only suicide attempt. At age 17, he again attempted to kill himself by drinking antifreeze, after a dog he was fond of died by doing so. *Id.* Jonathan Carr dropped out of school in tenth or eleventh grade. *Id.* at 463.

Both defendants were evaluated by medical professionals. Reginald Carr was evaluated by Dr. Mitchel Woltersdorf who diagnosed him with "brain damage." *Id.* at 460. He assessed that Reginald had suffered "significant head trauma or traumas, most likely during the first 8 or 9 years of his life." *Id.* at 461. "He found that he suffered from depression, antisocial personality disorder, distrust and paranoia." *Id.* The doctor indicated that "[t]he antisocial personality disorder also showed up in problems with anger management and difficulties with authority." *Id.* at 461.

Dr. Woltersdorf also testified that, with respect to Reginald's "anti-social personality disorder, ... there is no successful treatment protocol, and he had no disagreement with clinical profiles characterizing R[eginald] Carr as a 'self-centered and poorly socialized'" individual, 'primarily concerned with instant gratification of his immediate wants and needs.'" *Id.* at 473. See also J.A. 300-01 (Tr. Vol. 44 at 41-42) ("antisocial personality is the kind of person who's against authority...[t]here is no treatment for a personality disorder. It's something that he was given, so to speak, in life, somewhere between birth and the fifth year of life."); *id.* at 307 (Tr. Vol 44 at 48-49) ("personality disorder, you cannot treat it. I mean a person was made this way in the first five years of life, usually by a family situation.").

Reginald was also evaluated by Dr. Reidy, a forensic psychologist. He "echoed Woltersdorf's statement that family circumstances are usually the cause of the development of an antisocial personality disorder, noting that families are the strongest socializing force in life, and 'deviance begins at home.'" Pet. App. at 462. Dr. Reidy cited the parental abandonment and neglect, the family history of mental illness, the inappropriate early sexual exposure, the early violent behavior, and the emotional and physical abuse, concluding that Reginald Carr's "developmental trauma was severe and that protective factors were minimal to nonexistent." *Id.* at 463.

Mark Cunningham, a clinical and forensic psychologist, evaluated Jonathan Carr. *Id.* He testified that Jonathan was "emotionally disturbed from early childhood" and he "identified the family situation—involving physical and sexual abuse, parental neglect, and emotional detachment—and a genetic predisposition to mental illness and substance abuse" as the source of Jonathan's "emotional instability." *Id.* at 464. Moreover, he described "[w]hat we call sequential damage that's going from generation to generation to generation. In this family system, there is generational family disorganization, abandonment and negectful parenting." Tr. Vol. 45A at 115.

In all, Dr. Cunningham testified that, "[u]sing a . Department of Justice study of risk factors that increase the likelihood of involvement in criminal violence . Jonathan Carr exhibited 18 or 19 out of approximately 22 factors." Pet. App. 466. As he summarized: Jonathan Carr's violent crimes were the result of "'some very problematic genetic predispositions' in addition to 'neurological abnormalities,' 'a catastrophic family setting' leading to 'substance

abuse and disturbed adjustment that are aggravating each other during adolescence.'" *Id.* "Out of that, you have the influence of his older brother and intoxication at the time. And from that, you have the capital offense." *Id.*

Jonathan Carr's counsel sought to distinguish Jonathan from his older brother in several ways, to wit, his "lack of a serious criminal record prior to these offenses," J.A. 430 (Tr. Vol. 46 at 178), his relative youth, *id.* at 430-31 (Tr. Vol. 46 at 178), and his attendance and his demeanor at trial, *id.* at 431 (Tr. Vol. 46 at 178-79).

Instructions. At the end of the penalty phase but *before* closing arguments, the jury was instructed. The court gave identical instructions on aggravating and mitigating circumstances for both defendants. *Id.* at 380-83 (Tr. Vol. 46 at 115-19) (Reginald), *id.* at 383-86 (Tr. Vol. 46 at 119-122) (Jonathan).[1]

During the penalty phase, the court did *not* periodically instruct the jury that it was required to give individualized consideration to each defendant. The jury did, however, receive a single instruction about the requirement that it consider each defendant's death sentence individually:

> You must give separate consideration to each defendant. Each is entitled to have his sentence decided on the evidence and law which is applicable to him. Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant.

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[1] The jury instructions here are unconstitutional for the reasons explained in the respondent's briefs in *Kansas* v. *Gleason*, No. 14-452 (filed Aug. 3, 2015), and in *Kansas* v. *Reginald Carr*, No. 14-450 (filed Aug. 3, 2015), discussed and incorporated by reference here, *see infra* at 44-46.

J.A. 379-80 (Tr. Vol. 46 at 114-15).

As noted, the jury was never instructed to disregard Reginald Carr's shackling in its consideration of Jonathan Carr's sentence. The State's and defendants' closing arguments followed the instructions to the jury.

Capital Verdict. The jury unanimously found all aggravating circumstances with respect to both defendants. It also unanimously concluded that the aggravating factors outweighed any mitigating factors and returned death sentences for both defendants. The trial court imposed those sentences. Pet. App. 93.

3. *The Decision of the Kansas Supreme Court.*

The Supreme Court of Kansas affirmed one capital conviction for each defendant, but ordered that the death sentences be vacated and a new penalty trial be held. The court recognized that there is no "categorical[] mandate" that the penalty phase of capital proceedings be severed, Pet. App. 472, but concluded that, in the specific circumstances presented here, the defendants' Eighth Amendment rights to an individualized determination of their death sentences were violated by the trial court's refusal to sever the penalty phase proceedings. *Id.* at 45, 50, 530.

In Jonathan Carr's case, the court relied on the "reasons explained in" the opinion addressing Reginald Carr's penalty phase severance claim and "the family circumstances argument raised by J. Carr." Pet. App. 45. The court also cited Jonathan Carr's argument that "the joint trial inhibited the jury's individualized consideration of him because of family characteristics tending to demonstrate future dangerousness that he shared with his brother." *Id.* at 471. The court further "relie[d] on the prejudice to J.

Carr flowing from R. Carr's visible handcuffs during the penalty phase." *Id.* at 45 (relying, *inter alia*, on *Deck* v. *Missouri*, 544 U.S. 622, 624 (2005)).

The court found that Jonathan Carr's mitigation case—which sought to differentiate his moral culpability from that of his brother—was antagonistic to Reginald Carr. Pet. App. 473-75. The court pointed to the fact that Jonathan Carr's counsel elicited testimony from the brothers' sister (Temica) that Reginald had informed her, in a conversation from jail, that he fired all of the fatal shots in the execution-style Birchwood Drive murders. *Id.* at 475-76. Finally, the court noted that Jonathan Carr's mitigation evidence "was prone to being used as improper, nonstatutory aggravating evidence against [Reginald Carr]." *Id.* at 477.

The court acknowledged that the jury was instructed that the "evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant." Pet. App. 477. The court found, however, that "this is a rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic." *Id.* In particular, the court relied on "the defendants' joint upbringing in the maelstrom that was their family and their influence on and interactions with one another," and concluded that "the penalty phase evidence simply was not amenable to orderly separation and analysis." *Id.*

Finally, the Kansas Supreme Court found that the error was not harmless. Pet. App. 478-79. The court held that "[t]he test is not whether a death penalty sentence would have been imposed but for the error; instead the inquiry is whether the death verdict actually rendered in this trial was surely unattributable to the error." *Id.* at 479 (citation omit-

ted). The court found that "[t]he evidence that was admitted, the especially damning subset of it that may not have been admitted in a severed proceeding, and the hopelessly tangled interrelationship of the mitigation cases presented by the defendants persuades us that the jury could not have discharged its duty to consider only the evidence limited to one defendant as it arrived at their death sentences." *Id.* The death sentences were, accordingly, vacated and remanded for penalty phase proceedings to be held before different juries. *Id.* at 478-80.

Justice Moritz dissented. She focused her disagreement on the majority's holding that Reginald Carr was deprived of an individualized sentencing determination because Jonathan Carr's mitigation case was adverse to him. Pet. App. 555. She also believed that the court had erred by failing to adhere to the presumption that jurors can follow the judge's instructions. *Id.* at 556. And, she disagreed with the court's conclusion that the erroneous failure to sever the penalty phase proceedings was not harmless error. *Id.* at 557-58.

SUMMARY OF ARGUMENT

While joint trials in non-capital cases can serve important interests, including efficiency and saving resources, see *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993); *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987), this Court has explained that joint proceedings are not permitted—even in lower-stakes, non-capital cases—where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. See also *Kansas* v. *Marsh*, 548 U.S. 163, 174 (2006) (the constitution requires,

particularly in capital cases, that all defendants receive a "reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime.")

The Court has not addressed the standard for assessing when severance is required at the penalty phase of a capital case. However, given accuracy and reliability concerns surrounding the life and death decisions of penalty phase juries, an appropriate standard would call for severance when there exists *any reasonable risk* that the jury may impute material prejudicial evidence against one defendant, where that evidence would be inadmissible or otherwise absent in a separate penalty phase proceeding against the disadvantaged defendant. At the very least, penalty phase proceedings in a capital case must be severed if joint proceedings would violate the standard set in *Zafiro*, a non-capital standard which calls for a "serious risk" of prejudice from evidence that would be inadmissible in a separate trial.

Here, the joint penalty phase proceedings satisfied even the *Zafiro* "serious risk" standard. That is because, first, Reginald Carr chose not to conceal his shackles from the jury during the penalty phase of this case. "[T]he offender's appearance in shackles almost inevitably implies to a jury that court authorities consider him a danger to the community," and "almost inevitably affects adversely the jury's perception of the defendant's character," and thus undermines the jury's ability to weigh all relevant considerations in determining whether he deserves death. *Deck*, 544 U.S. at 622-23. Reginald Carr's choice thus undermined the jury's ability to weigh all relevant considerations in determining whether Jonathan Carr deserved death. The judge warned Reginald

Carr that he was waiving any claim based on resulting prejudice. But the judge ignored the spillover prejudice and dangerousness by association that Reginald Carr's visible shackles created for Jonathan Carr in the context of this case, and he did not give any instruction that might have mitigated that harm.

Moreover, the prejudice flowing to Jonathan Carr from Reginald Carr's shackling was compounded by (i) the testimony of Reginald Carr's own expert to the jury that he was a dangerous, incurable sociopath as a result of his genetics and upbringing, and (ii) the prosecutor's focus on the fact that Reginald and Jonathan Carr are brothers who share the same DNA and the same upbringing, and thus deserve the same fate. It is unreasonable to conclude that none of the jurors imputed to Jonathan Carr the evident dangerousness and sociopathy of his brother.

Not only were Jonathan Carr's constitutional rights violated by the admission of evidence and acts solely attributable to Reginald Carr, but the jury also could not adequately and fairly consider Jonathan Carr's mitigating evidence—*e.g.*, the evidence of a family history of mental illness and childhood sexual abuse and neglect. Jonathan Carr's mitigating evidence was irrevocably tainted by the prosecutor's repeated tethering of him to his dangerous, sociopathic brother.

The single jury instruction observing that the Carr brothers should receive individual consideration could not cure this prejudice. Among other reasons, the jury was *never* instructed to avoid drawing inferences about Jonathan Carr's future dangerousness from Reginald Carr's shackling. Under the particular circumstances here, there was a strong "likelihood that the [given] instruction [would] be disregarded," with devastating effect, as was foreseeable based on

events during the trial and before the sentencing proceeding began. *Cruz* v. *New York*, 481 U.S. 186, 193 (1987). In any event, the State relies on an instruction that came *before* the prosecution's closing argument, which urged the jury to treat the defendants as equally culpable and used Reginald Carr's sociopathy in arguing that *both defendants* should be sentenced to death.

Finally, this error cannot be deemed harmless. In evaluating errors such as the ones at issue here, the question is not "whether the legally admitted evidence was sufficient to support the death sentence but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Satterwhite* v. *Texas*, 486 U.S. 249, 258-59 (1988) (citation omitted). The specific question here, then, is whether evidence of Reginald Carr's dangerous, incurable sociopathy and/or the jury's inability to consider Jonathan Carr's mitigation evidence contributed to the jury's decision not to grant mercy. The Kansas Supreme Court's decision that Jonathan Carr's sentence should be vacated and that his case should be remanded for resentencing should be affirmed.

ARGUMENT

I. FAILURE TO SEVER AT THE PENALTY PHASE DEPRIVED JONATHAN CARR OF A REASONED, INDIVIDUALIZED DETERMINATION OF HIS DEATH SENTENCE.

Jonathan Carr's sentencing abridged his right to an individualized determination in two important ways: first, the jury considered extraneous, prejudicial evidence, *e.g.*, *Romano* v. *Oklahoma*, 512 U.S. 1, 12 (1994) ("[t]he relevant question . is whether the

admission of [irrelevant] evidence . so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process."); second, the sentencing proceedings abrogated Jonathan Carr's ability to submit, and to have the jury consider, mitigation evidence, *e.g.*, *Marsh*, 548 U.S. at 174 ("the sentencer must have full access to . highly relevant' information" surrounding mitigating circumstances.) (citations omitted).

First, a jury cannot consider evidence about one defendant in deciding either the guilt or the sentence of a second defendant. *Zafiro*, 506 U.S. at 539. See *id.* (prejudice "might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant."); *id.* (noting approvingly that a trial court would likely sever a case "[w]hen the risk of [such] prejudice is high").

In analogous circumstances, this Court has made clear that "the death sentence must be set aside" where, as a result of legal error, the jury has been allowed to hear and consider evidence "that would not otherwise have been before it." *Brown* v. *Saunders*, 546 U.S. 212, 219 (2006) (describing *Zant* v. *Stephens*, 462 U.S. 862, 886 (1983)). See also *Zant*, 462 U.S. at 885 (explaining that the jury may not consider evidence that is "constitutionally impermissible or totally irrelevant to the sentencing process" in capital cases). Cf. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974) (the issue is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process.").[2] That is because "when the sentencing body

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[2] The United States suggests that "the individualized-consideration requirement [is] an *inclusionary* principle, not an *exclusionary* one," U.S. Br. 24 n.8, but this Court has not sliced

is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." *Stringer* v. *Black*, 503 U.S. 222, 232 (1992).

Here, the jury both saw and heard at least two critical pieces of evidence in the penalty phase that were unique to Reginald Carr, but were urged upon the jury as evidence against Jonathan Carr; namely (1) Reginald Carr's insolent display of his shackles to the jury; and (2) expert testimony, unique to Reginald Carr, of his incurable sociopathy.

Second, "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246 (2007). See also *McCleskey* v. *Kemp*, 481 U.S. 279, 306 (1987) ("[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty."). The Eighth Amendment "require[s] that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Marsh*, 548 U.S. at 174 (quoting *Lockett*, 438 U.S. 586, 603 (1978)) (alteration in original).

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the requirement so finely. A jury's consideration of prejudicial evidence in sentencing one defendant that is relevant only to his co-defendant violates the former's right to individualized consideration just as thoroughly as a jury's failure to consider relevant mitigating evidence. That error generally will also be a due process violation as the United States explains. *Id.*

The State's penalty phase presentation, in combination with Reginald Carr's penalty phase decisions and strategy, effectively precluded the jury from giving "meaningful consideration and effect" to Jonathan Carr's mitigation case, and violated his right to an individualized determination that he deserved death. See *Lockett*, 438 U.S. at 604 ("the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.") (footnote omitted); *Eddings* v. *Oklahoma*, 455 U.S. 104, 113 (1982) (holding that "limitations placed by [the Oklahoma] courts upon the mitigating evidence they would consider violated" the rule established in *Lockett*). See also *Abdul-Kabir*, 550 U.S. at 246 ("sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual."); *McCleskey*, 481 U.S. at 306 ("[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty."). The Eighth Amendment "require[s] that the sentencer not be precluded from considering, as a *mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Marsh*, 548 U.S. at 174 (quoting *Lockett*, 438 U.S. at 603).

A. The Jury Improperly Considered Evidence Relating To Reginald Carr In Deciding Whether Jonathan Carr Deserved Death.

1. Reginald Carr's Decision To Display His Shackles.

This Court has expressly held that shackling a defendant in the courtroom "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point." *Deck*, 544 U.S. at 633. And, at joint proceedings, the co-defendants of that shackled defendant may suffer "guilt by association" when tried simultaneously with that shackled defendant. See, *e.g.*, *United States* v. *Jarvis*, 792 F.2d 767, 768 (9th Cir. 1986). The jury is particularly likely to impute the shackled defendant's dangerousness to a co-defendant where, as here, the defendants are brothers, and the prosecution's theme that they are linked by genetics, their upbringing, their joint choices and their joint crimes recurs throughout trial. Moreover, the trial court gave no instruction to the jury that the jurors should *not* consider Reginald Carr's shackles in assessing whether Jonathan Carr presents a danger to the community. In light of the close association between the brothers and co-defendants, Reginald Carr's brazen display of his shackles to the jury after his conviction—and his willingness to have the jury perceive him as so dangerous to the community that he had to be chained—prejudiced Jonathan Carr, who thus failed to receive an individualized consideration of his death sentence.

Shackles are a physical manifestation and persistent reminder of the state's conclusion that it "need[s]

to separate a defendant" who is uniquely dangerous from the rest of the community. *Deck*, 544 U.S. at 630 (internal quotation marks omitted) (citation omitted). Visible shackles also compromise the "dignified" judicial process which requires "respectful treatment of defendants [and] reflects the importance of the matter at issue." *Id.* at 631. See also *id.* (citing "the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment"). See also *Estelle* v. *Williams*, 425 U.S. 501, 505 (1976) (trying a defendant in prison clothes creates a "continuing influence throughout the trial," and an "unacceptable risk" that the jury will consider "impermissible factors," and thus is unconstitutional.); *Illinois* v. *Allen*, 397 U.S. 337, 344 (1970) ("the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant ").

The prejudicial effect of shackling is so evident that this Court has concluded that shackles are the "least acceptable" method to deal with a disruptive defendant. *Id* at 350. Prevention of such prejudice is particularly critical in a capital case, where there is an "'acute need' for reliable decisionmaking." *Deck*, 544 U.S. at 632 (citation omitted). Thus, visibly shackling a defendant before a jury is unconstitutional unless it is "justified by a state interest *specific* to a *particular* trial." *Id.* at 629 (emphasis added).

In certain joint trials and proceedings, the unconstitutional prejudice that follows from the shackling of one defendant flows by association to his co-defendant. The question whether a co-defendant has suffered that guilt by association—here, dangerousness by association—is a "case specific" inquiry into "particular concerns related to the defendant on trial." *Id.* at 633. In many cases, juries are likely to

assume a defendant's guilt or dangerousness by association when jointly tried with a shackled co-defendant. See, *e.g.*, *Jarvis*, 792 F.2d at 768 (jury's sighting of shackled co-defendants jeopardized the absent defendant's right to a fair trial because "jurors would infer his 'guilt by association' with the other shackled defendants"); *id.* ("what the jurors saw would have a detrimental effect on the rights of all of the defendants to be presumed innocent of all charges."); *Reynolds* v. *Gomez*, No. 97-16126, 1998 WL 869908 (9th Cir. Dec. 14, 1998) (unpublished) (following *Jarvis*); *United States* v. *Mannie*, 509 F.3d 851, 857 (7th Cir. 2007) (co-defendant's prison garb creates "an impermissible risk that some jurors voted to convict based on the perception that [the co-defendant in civilian clothes] was a violent gangster who needed to be incarcerated for the safety of the community").

Here, the State packaged the brothers as a single unit throughout the trial and penalty phase in this capital case, arguing that they were equally responsible for all aspects of the violent crimes committed and thereby deserved to share a single fate. This merging of the brothers' guilt and responsibility is exemplified by the prosecution's closing argument in the penalty phase: "[t]hese defendants share a lot of things in common a common family history some DNA . intelligence . choices." J.A. 402 (Tr. Vol. 46 at 142). This was followed by the State's observation that Reginald Carr is a "sociopath" as a result of his genetics and upbringing, and then an express linkage of Reginald Carr's sociopathic nature to Jonathan Carr who, of course, shares the same genetics and upbringing:

> [Reginald Carr is] an antisocial personality, otherwise known commonly as a sociopath, oppor-

> tunistic, self-indulgent. That is who you are sitting in judgment of, uncaring *individuals*. *They* beg you today for sympathy. *They* do. *They* are begging one of you, just one, because that's all *they* need."

Id. at 437 (Tr. Vol. 46 at 186-87) (emphasis added).

In these circumstances, Reginald Carr's decision to display his shackles and invite the jury to see him as dangerous would result ineluctably in the jury viewing Jonathan Carr as dangerous by association. See, *e.g.*, *Mannie*, 509 F.3d at 857 (prejudice by association was likely because "the government's theory of the case was that [both co-defendants] were dangerous members of a street gang.") (footnote omitted); *Reynolds*, 1998 WL 869908, at *1 (where the unshackled defendant drove the robbery getaway car for the shackled defendant, the evidence was "inexorably intertwined" such that the shackles created a "substantial and injurious effect or influence in determining the jury's verdict" against the unshackled defendant) (citation omitted).

The Court has held that when a defendant appears before a jury in shackles, the prejudice is so great that "the defendant need not demonstrate actual prejudice to make out a due process violation." *Deck*, 544 U.S. at 635. The trial judge here acknowledged the prejudicial effect the visible shackles would have on Reginald Carr in the penalty phase, saying "if the jury sees [the restraints], then the defendant has invited it." J.A. 59 (Tr. Vol. 41A at 7). But that same judge simply ignored or neglected the effects that Reginald Carr's visible shackling would have on the jury's perception that Jonathan Carr is dangerous to the community, putting a "thumb on the scale" for a sentence of death. See *Deck*, 544 U.S. at 633. And no instruction informed the jury that it should disregard

Reginald Carr's decision to display his shackles when considering whether to impose a death sentence on Jonathan Carr. See *Commonwealth* v. *Cruz*, 311 A.2d 691, 692 (Pa. Super. Ct. 1973) ("it is of the essence that [the judge] instruct the jury in the clearest and most emphatic terms that it give such restraint no consideration whatever in assessing the proofs and determining guilt."); *Broadus* v. *State*, 487 N.E.2d 1298, 1305 (Ind. 1986) (admonishing the jury to disregard the shackles in determining the defendant's circumstances where the defendant displayed his shackles to the jury).

Neither the State nor the United States makes any serious attempt to address the prejudice to Jonathan Carr arising from his brother's visible shackles. Ignoring the wall of authority highlighting the patent prejudice from this practice, see *supra* at 21-24, the United States relegates its discussion of this prejudice to a footnote, speculating that Reginald Carr's shackles may have "suggest[ed] that authorities did not regard the unshackled defendant as a danger." U.S. Br. 31 n.10. The State, too, suggests that Reginald Carr's shackles should have indicated that Jonathan Carr was better behaved than his brother. Pet'r Br. 49. But if that were true, then there would be no need for the many courts that have discussed spillover associational prejudice to have done so. Regardless, these speculative conclusions are particularly inapt here, where the State's presentations at both the guilt and penalty phases characterized the brothers as a unit whose birth, family, and crimes should result in the same verdict and the same punishment.

The State (but not the United States) asserts that this Court's analysis in *Deck* applies only to the guilt phase of criminal trials. Pet'r Br. 48. In fact, *Deck* explicitly considers shackling during the punishment

phase of a capital case. See 544 U.S. at 630. This Court reasoned that the decision between life and death in the sentencing phase "is no less important than the decision about guilt," and so the "considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases." *Id.* at 632.

2. Reginald Carr's Sociopathy And Dangerousness Were Attributed To His Genetics And Upbringing, And Thus Both Were Unconstitutionally Imputed To Jonathan.

Not only did Reginald Carr's visible shackling render Jonathan Carr's penalty phase trial unconstitutional, but the State wrongly argued that that Reginald and Jonathan Carr are a unit, identically culpable for the events that occurred. And, based on the brothers' shared genetics, family background and upbringing, the State leveraged evidence about Reginald Carr's dangerousness and incurable sociopathy to ensure that Jonathan Carr, too, would receive the death sentence.

Specifically, the State submitted the same aggravating circumstances in support of the death penalty for both Reginald and Jonathan Carr. It also submitted the full record of the guilt phase as evidence of aggravating circumstances against both, and chose to present nothing further. Accordingly, the State's penalty phase presentation was limited to its opening, its cross-examination of Reginald and Jonathan Carr's witnesses, and its closing argument. Throughout the penalty phase, the State's theme was that the Carr brothers should be considered as one.

The State's opening argument in the penalty phase focused on the "heinous ideas and depraved conduct of Jonathan and Reginald Carr together. Together." J.A. 66 (Tr. Vol. 41A at 16). The State expressly stated that "Their participation was equal." *Id.* at 436 (Tr. Vol. 46 at 185). See also *id.* at 395 (Tr. Vol. 46 at 133) ("it was not in Jonathan and Reginald Carr's best interest to leave individuals alive to tell the story that might cause them to have responsibility for the already heinous and atrocious acts that they had committed before the killings.").

The State several times noted that the brothers share genetic material, "shar[e] DNA." *Id.* at 399 (Tr. Vol. 46 at 137). See *id.* at 402 (Tr. Vol. 46 at 142) ("[t]hey share some DNA."). And, as described above, the State's closing argument highlighted Reginald Carr's sociopathy and incurable future dangerousness and sought to link him and these qualities—through genetics and family circumstances—to Jonathan Carr:

> Dr. Woltersdorf indicated that after giving psychological testing to Reginald Carr, that he was an *antisocial personality, otherwise known commonly as a sociopath, opportunistic, self-indulgent.* That is who you are sitting in judgment of, *uncaring individuals.* They beg you today for sympathy. They do. They are begging one of you, just one, because that's all they need.
>
> They want to get that sympathy by suggesting that their excuse is to deflect the responsibility. They want to beg you for sympathy because of that rough childhood.

Id. at 437 (Tr. Vol. 46 at 186-87) (emphasis added).

The State came back to the brothers' genetic and family circumstances and other similarities and their

resulting equal blameworthiness over and over again. The prosecutor stated, "we point to each defendant, two defendants, two brothers, two culprits, two criminals, two individuals all found to be culpable of capital murders of four people." *Id.* at 394 (Tr. Vol. 46 at 131). And the prosecutor referred to a picture of Reginald and Jonathan Carr as children and argued:

> These kids are gone. They don't exist anymore. These children have grown up to adults that didn't just lose their moral compass, ladies and gentlemen, they threw it away. These are individuals who lead and led their lives with the reckless disregard for the rights of others. Who committed crimes that were heinous and atrocious and cruel and vi[le]

Id. at 398 (Tr. Vol. 46 at 136-37).

As the prosecutor concluded:

> These defendants share a lot of things in common. They have somewhat of a common family history, although they were separated at times. Separated for a good period of time when Reginald Carr was in prison. They have the same eye color. They share some DNA. They share intelligence. They also share immediate self gratification. That they want something and they want it now. And they also share choices.

Id. at 402 (Tr. Vol. 46 at 142).

It was Reginald Carr's mitigation case that provided the State with ammunition to taint Jonathan Carr's mitigation case with Reginald Carr's sociopathy and dangerousness. As noted, Dr. Woltersdorf, the neuropsychologist who had tested Reginald Carr, testified that "Reginald has antisocial

personality disorder." *Id.* at 300 (Tr. Vol. 44 at 41) He explained that:

> [I]n Reginald's case, the antisocial personality will show itself in difficulties with anger management and difficulties with authority which [are] the two hallmarks of antisocial personality disorder. *There is no treatment for a personality disorder.* It's something that he was given, so to speak, in life, somewhere between birth and the fifth year of life.

Id. at 301 (Tr. Vol. 44 at 42) (emphasis added).

See *id.* at 307 (Tr. Vol. 44 at 48-49) (this kind of "personality disorder, you cannot treat it. I mean a person was made this way in the first five years of life, usually by a family situation.").

In addition, Dr. Reidy, a forensic psychologist also testifying on behalf of Reginald Carr, noted that he had looked at family criminality and a family history of mental illness, saying "there's some evidence that there may be some genetic link there." *Id.* at 219 (Tr. Vol. 43A at 32). See *id.* at 220 (Tr. Vol. 43A 34)("I'm talking about family criminality. We're talking about family mental illness."). Thus, Reginald Carr's chosen mitigation case—that he had an untreatable disorder arising from his DNA and his family history and circumstances—necessarily affected the jury's perception of Jonathan Carr, who shared that DNA, history, and context.

It is no answer to say that the jury was obligated, and should be presumed to follow the single instruction on individualized consideration, because such testimony about "family criminality" necessarily implicated Jonathan as well as Reginald Carr. And, further, had there in fact been a severance, the State

could not have used that evidence against Jonathan Carr in a separate trial.[3]

But in the joint penalty phase, Reginald Carr's mitigation case was used by the State to encourage the jury to attribute Reginald Carr's future dangerousness (inferred from both the visible shackling and the diagnosis of incurable sociopathy) to Jonathan Carr, and to impose the death penalty on both brothers. Cf. *Foster* v. *Commonwealth*, 827 S.W.2d 670, 682 (Ky. 1991) (admission of prior acts of misconduct and evidence regarding "battered wife syndrome" of co-defendant were prejudicial to defendant Foster and made the two defendants' mitigation evidence antagonistic).

B. Jonathan Carr's Efforts To Present An Independent Mitigation Case Were Prejudicially Compromised.

In his mitigation case, Jonathan Carr sought to make two points. First, he attempted to differentiate himself from Reginald Carr in several respects: his "lack of a serious criminal record prior to these offenses," J.A. 430 (Tr. Vol. 46 at 178); his relative youth, *id.* at 430-31 (Tr. Vol. 46 at 178) (both statuto-

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[3] The foregoing also makes clear that Jonathan Carr is not arguing that the Eighth Amendment creates a *per se* rule against joinder in capital sentencing proceedings. The erroneous admission of evidence in a capital sentencing proceeding does not always prevent a jury from individualized consideration of defendants; nor does a contrast between co-defendants always prevent the jury from exercising mercy. But here, the State's strategy was to emphasize that the defendants are brothers, united in culpability and in moral responsibility, and Reginald Carr's mitigation case presented him as an incurable, dangerous sociopath in part due to his DNA. In these unusual circumstances, Jonathan Carr was unable to make his individualized case for mitigation.

ry mitigating circumstances, see Pet. App. 573-74); and his good behavior during trial, J.A. 431 (Tr. Vol. 46 at 178-79). Second, he sought to explain his behavior through the testimony of Dr. Mark Cunningham, a clinical and forensic psychologist, who testified about Jonathan Carr's genetic predispositions, cognitive deficiencies, his family circumstances and traumatic incidents in his youth (including a wrongful accusation of rape and its fallout). Tr. Vol. 45A at 4-145; Tr. Vol. 45B at 4-140. The drumbeat of the State's presentation prevented individualized consideration of Jonathan Carr's significant points of difference, including the absence of a prior record. Critically, moreover, the State's linkage between Reginald and Jonathan Carr, most notably the common wellsprings of dangerousness and sociopathy in their DNA and upbringing, prevented the jury from considering Jonathan Carr's evidence about his genetic predispositions and his upbringing in mitigation. Indeed, evidence that should have been mitigating became damning, as it tied Jonathan Carr to Reginald Carr's incurable pathology and dangerousness, and prevented the jury from "giv[ing] meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on" Jonathan Carr. *Abdul-Kabir*, 550 U.S. at 246.

The prosecution's seizure of the DNA cudgel and Reginald Carr's behavior also put at substantial risk Jonathan Carr's ability to appeal to the jurors' individual and collective sense of mercy. Under Kansas law, trial courts instruct penalty phase juries that "[m]itigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, even though they

do not justify or excuse the offense" and that "you may consider sympathy for a defendant." Pet. App. 573. That appeal, however, meant much less here in light of Reginald Carr's mitigation evidence and the prosecutor's urging that the brothers should be considered a team.

C. Heightened Reliability Concerns Require A Lower Threshold For Severance In Penalty Phase Proceedings.

With respect to the question presented here, the appropriate severance standard for penalty phase capital proceedings would call for severance where there exists any reasonable risk that the jury may impute material prejudicial evidence against one defendant, where that evidence would be inadmissible or otherwise absent in a separate penalty phase proceeding against the disadvantaged defendant. Essentially, "because there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Zant*, 462 U.S. at 884-85 (quoting *Woodson*, 428 U.S. at 305). As *Zafiro* recognizes, joint trials result in increased efficiencies, but those efficiencies may give rise to "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment . ." 506 U.S. at 539. Thus, *Zafiro* makes clear that efficiency does not trump constitutional concerns, *id.*, a point with particular salience in capital cases.

The Eighth Amendment's requirement for individualized sentencing also requires heightened vigilance with respect to the risks of prejudice arising from a joint trial in a capital sentencing. See *Lockett*, 438

U.S. at 605 ("an individualized decision is essential in capital cases [and] [t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). The requirement for vigilance fell on all parties in the courtroom in this case, including the trial court, the prosecutor and defense counsel. Kansas law in capital cases exempts defense counsel's ineffective assistance in such an obvious instance, but not the trial court's oversight.

Here, as the Kansas Supreme Court held, the trial court erred by refusing to sever the guilt phase of Reginald and Jonathan Carr's capital trial where their defenses were antagonistic. Pet. App. 191-92. The trial court compounded that error by its refusal to sever the penalty phase of the proceedings, and the joint penalty phase proceedings allowed and encouraged the jury to consider evidence that pertained to Reginald Carr against Jonathan Carr and prevented the jury from an individualized and full consideration of Jonathan's mitigation evidence. These errors denied Jonathan Carr his right to an individualized determination of death and rendered the jury's verdict unreliable. *Zafiro*, 506 U.S. at 539. That reliability concern, in turn, necessitates vacatur of Jonathan Carr's death sentence.[4] See also *United States* v. *Tipton*, 90 F.3d 861, 892 (4th Cir. 1996) ("trial court dis-

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[4] Because the failure to sever the penalty phase proceedings here rendered the verdict unreliable and thus unconstitutional, this Court need not decide whether the Constitution permits *Zafiro*'s presumption favoring joinder in the penalty-phase of capital cases. There is a serious question whether a presumption favoring joint trials is appropriate in capital cases in light of the heightened reliability concerns in those cases, at least where one defendant has presented some evidence that he would be prejudiced by a joint trial or sentencing.

cretion as to severance in the capital-penalty phase must be considered . . constitutionally constrained at its outer limits and, as a corollary, . our standard of review is for abuse of a discretion" is constrained by "the Supreme Court's 'individualized consideration' jurisprudence . ").

The outcome here is not surprising. The United States' brief identifies 35 capital trials involving multiple defendants since 2000. U.S. Br. 20-21 n.6-7. Joint penalty phase proceedings were held in 19 of those cases; but in 16 cases, the district court granted motions to sever at either the guilt or penalty phase of the case. *Id.* at 20-21 n.6-7 & App. A. Thus, in 47% of federal capital cases—roughly half—the trial court has deemed severance necessary. This record does not support a presumption favoring joinder in penalty phase proceedings in capital cases, and suggests that trial court judges often recognize that joint proceedings may prejudice one or both defendants.[5]

This conclusion need not result in separate trials for each defendant where the prejudice concerns arise only at sentencing. As trial judges have recognized, "if severance is not required for the liability trial, the individualized determination objective can be largely achieved by holding sequential, separate penalty trials for each defendant." *United States* v. *Aquart*, No. 3:06cr160, 2010 WL 3211074, at *7 (D. Conn. Aug. 13, 2010). Moreover,

> [conducting] [s]equential penalty phases has the advantage of preserving a joint guilt phase,

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[5] And while most states with capital punishment regimes have liberal joinder rules, two states require that any request for severance in a capital case be granted and a third creates a presumption of severance. U.S. Br. 20-21 n.7 (surveying relevant states' laws).

> which promotes judicial economy and avoids the potential inequity of conflicting verdicts by using one jury; minimizing the risk that co-defendants "prosecute" one another at a joint penalty phase; providing defendants with an individualized determination of sentence; and ensuring that the jury that determines guilt also determines sentence.

United States v. *Henderson*, 442 F. Supp. 2d 159, 162 (S.D.N.Y. 2006). See also *United States* v. *Taylor*, 293 F. Supp. 2d 884, 900 (N.D. Ind. 2003) ("consecutive sentencing hearings at which the cases for and against one defendant are presented and after which the jury deliberates only on the sentence to be imposed on that one defendant will facilitate the jury's individualized consideration of each defendant.").

Conducting sequential penalty phase proceedings here would have forestalled the prejudice described above. The jury would not have seen Reginald Carr's shackles while deciding Jonathan Carr's sentence, and the State would have been required to address whether each brother deserved death individually. Further, the jury would not have heard that Reginald Carr was an incurable sociopath as a result of DNA and family circumstances that Jonathan Carr shared. Cf. *Henderson*, 442 F. Supp. 2d at 162 ("[s]equential penalty phases in a multi-defendant capital trial, though not favored, have occurred, especially where one defendant has mitigating [here aggravating] evidence of such force that it places his co-defendant at a unique disadvantage.") (citation omitted).

II. THE JURY INSTRUCTION DID NOT CURE THE PREJUDICE TO JONATHAN CARR ARISING FROM THE FAILURE TO SEVER.

The State argues that prejudicial errors described above were cured by a single instruction given to the capital jury before it heard the State's closing arguments. In so arguing, the State leans heavily on the generalization that jurors are presumed to obey the instructions they receive. See Pet'r Br. 36-39. But that presumption is subject to a long-established exception: "where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission." *Throckmorton* v. *Holt*, 180 U.S. 552, 567 (1901). See *Hopt* v. *People*, 120 U.S. 430, 438 (1887) (same); *Waldron* v. *Waldron*, 156 U.S. 361, 383 (1895) ("the curative effect of the correcti[ve instruction] . . depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court."). More recent opinions have recognized this exception as well. *E.g.*, *Bruton* v. *United States*, 391 U.S. 123, 135-36 (1968) ("there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.") (citations omitted).[6]

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[6] *See also, e.g.*, *United States* v. *Hale*, 422 U.S. 171, 172-73 (1975) (jury instructions do not cure the prejudice arising from the prosecutor's inquiry into a defendant's silence when arrested, even though he had invoked Miranda rights); *Grunewald* v. *United States*, 353 U.S. 391, 423-24 (1957) (jury instructions do not cure the harm caused by the prosecutor's questioning of a

This Court has distilled from its precedents three factors most likely to determine whether the usual presumption that juries follow instructions holds true: first, "the likelihood that the instruction will be disregarded"; second, "the probability that such disregard will have a devastating effect"; and third, the "determinability of these facts in advance of trial." *Cruz*, 481 U.S. at 193 (citing *Bruton*, 391 U.S. at 136; *Marsh*, 481 U.S. at 210). All three factors here point to the exception, not the rule, and the jury should not be deemed to have followed the lone instruction provided to them about individualized treatment of the two Carr brothers.

Turning to the first factor, as explained above, the jury was likely to neglect the trial court's instruction on individualized consideration in light of the prejudicial effect of Reginald Carr's shackling on Jonathan, the State's direct linking of the brothers through their DNA and family circumstances, and the State's leveraging of Reginald Carr's incurable sociopathy and dangerousness against Jonathan. See *supra* at 26-30. Even assuming *arguendo* that some instructions might have forestalled this significant

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defendant who had invoked his Fifth Amendment privilege); *United States* v. *Parks*, 411 F.2d 1171, 1172-73 (1st Cir. 1969) (jury instruction did not cure prejudice arising from presentation of inadmissible documentary evidence throughout trial); *Davidson* v. *Smith*, 9 F.3d 4, 8 (2d Cir. 1993) (same, where irrelevant testimony on the plaintiff's psychiatric history was elicited); *Mora* v. *United States*, 190 F.2d 749 (5th Cir. 1951) (same, where co-defendant's confession was admitted); *Maytag* v. *Cummins*, 260 F. 74, 83 (8th Cir. 1919) (same, where the jury issued an unusually large verdict in an action for slander after hearing substantial immaterial and irrelevant evidence); *Holt* v. *United States*, 94 F.2d 90 (10th Cir. 1937) (same, where the statement of a co-conspirator had probably made such a deep and lasting impression on the minds of the jurors that the curative instruction was insufficient).

prejudice to Jonathan Carr, the lone instruction here did not. As noted, the judge did not instruct the jury to avoid drawing the inference that Jonathan Carr is a continuing danger to the community from Reginald Carr's shackles. And, the instruction requiring individualized consideration of the evidence, see J.A. 379-80 (Tr. Vol. 46 at 114-15), came only once and was "ineffective to repair or even to mitigate the damage." *Parks*, 411 F.2d at 1172-73 (jury instruction did not cure prejudice where the jury was exposed to numerous irrelevant exhibits throughout the trial, but was instructed to disregard them only later because the jury "could not possibly have been able to erase the irrelevant evidence from its collective mind").

Indeed, in light of the substantial risk that the jurors could conflate the brothers, exacerbated by the State's arguments, the trial court should have instructed the jurors to give each defendant individualized consideration throughout the penalty phase (or on at least some of the many occasions when the State argued that the brothers were a single unit). Cf. *Tipton*, 90 F.3d. at 892 ("we are satisfied that the court's *frequent* instructions on the need to give each defendant's case individualized consideration sufficed to reduce the risk to acceptable levels.") (emphasis added).[7]

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[7] *Tipton*, 90 F.3d at 892-93, illustrates a trial judge's protective use of instructions to ensure individualized consideration of defendants tried together.

> At the outset of the penalty phase, the court—obviously aware of the special risk—admonished the jurors that they "must consider each defendant individually." In its concluding instructions on the jury's duty "to decide whether each individual defendant shall live or die," the court reiterated that the duty was "to make a decision regarding each defendant and each capital case." Fur-

Here, the judge's instruction preceded some of the State's most prejudicial arguments. Contrary to the instruction, those arguments essentially urged the jury to treat the brothers as a unit, which likely undid any compartmentalizing benefit that the instruction might have achieved. J.A. 391 (Tr. Vol. 46 at 128). Cf. *Boyde* v. *California*, 494 U.S. 370, 384-85 (1990) (noting that prosecutorial misrepresentations may have a decisive effect on juries, though they can be corrected by courts). That argument was the State's final word before the jury deliberated, and its content made it substantially less likely that the jury instruction the State relies on prevented the prejudice described *supra* at 26-30.

In response, the State claims that "this jury had already demonstrated its ability to differentiate" between the Carr brothers by convicting them of different counts at the guilt phase, see Pet'r Br. 17. But, the jury's tasks in the guilt and penalty phases are fundamentally different. Determining whether the State has proven each of a specific set of elements of a specific crime is much more concrete than determining whether a defendant, on balance and in light of

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> ther, in its instructions on the critical weighing process, the court especially emphasized the need for individualized consideration by pointing out that . . . each defendant relied on mitigating factors specific to his case. This critical point was further emphasized by the court's submission of separate packets of penalty verdict forms for each defendant. Still further emphasis occurred in the court's remonstrances to Government counsel to "be specific" and to "do it individually," whenever objections were made to Government counsels' references to the defendants collectively.

Tipton, 90 F.3d at 892-93 (citations omitted).

all possible aggravating and mitigating evidence, "deserves" to die or should receive mercy.

As for the second factor, the pressure upon the jury to consider Jonathan Carr "together" with his brother is likely to have had a devastating effect. It allowed the jury to consider substantial evidence of Reginald Carr's dangerousness and incurable sociopathy in deciding to sentence Jonathan Carr to death.

Finally, for the third factor, the prejudice that arose from this joint penalty phase proceeding was foreseeable. Throughout the guilt phase, Jonathan Carr had repeatedly requested that his case be severed from his brother's. He again made that request at the outset of the penalty phase. And before the penalty phase began, Reginald Carr decided to display to the jury his shackles and, by implication, his future dangerousness. Indeed, the trial court was well aware that the State was treating the brothers as a single entity. The State's strategy in the penalty phase was simply a continuation of its strategy at trial.

III. THE ERROR WAS NOT HARMLESS.

This Court has generally held that the prosecution must prove beyond a reasonable doubt that a constitutional error did not contribute to a verdict in order to demonstrate that an error was harmless and a verdict may stand. See *Chapman* v. *California*, 386 U.S. 18, 24 (1967). This Court employs harmless error analysis in those cases where the scope of an error is "readily identifiable" and "the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." *Holloway* v. *Arkansas*, 435 U.S. 475, 490 (1978).

With respect to the evaluation of harmless-error analysis in capital sentencing proceedings, this Court has observed:

> [T]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.

Satterwhite, 486 U.S. at 258. Accordingly, while this Court does apply the harmless-error rule to the wrongful admission of evidence in capital sentencing proceedings, it has cautioned that this evaluation must be done with full recognition that determining the effect of error in the capital sentencing process presents both heightened importance and greater difficulty than in run-of-the-mill cases. See also *Mills* v. *Maryland*, 486 U.S. 367, 376 ("[i]n reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds.").

The question is not "whether the legally admitted evidence was sufficient to support the death sentence but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Satterwhite*, 486 U.S. at 258-59 (quoting *Chapman*, 386 U.S. at 24). The State cannot satisfy that standard here.

A reviewing court cannot be secure that Reginald Carr's shackling and the prosecutor's blurring of the lines between the brothers, including Reginald Carr's dangerousness and sociopathy, did not taint the jury's determination of Jonathan Carr's sentence. Moreover, it is unclear whether Jonathan Carr's lack of a prior criminal record, suicide attempts, family circumstances and other mitigating evidence might

have moved the jury to mercy were it not for the aggravating perception of future, incurable dangerousness resulting from joint proceedings with his brother. Significantly, the State repeatedly emphasized the numerous connections between the brothers (genetics, family circumstances, equal culpability), driving home the message that if Reginald Carr deserved death, so too did Jonathan Carr. Cf. *Clemons* v. *Mississippi*, 494 U.S. 738, 753 (1990) (error was not harmless because "the State repeatedly emphasized and argued the [invalid] 'especially heinous' factor during the sentencing hearing" while giving "little emphasis" to other aggravating factors).

Both aspects of this unconstitutional failure to provide Jonathan Carr with an individualized death sentence were exacerbated by the trial court's prior erroneous failure to sever the guilt phase proceedings. Reginald and Jonathan Carr had already served at trial as "second prosecutors," each seeking to place greater blame for these capital crimes on the other in the hope of obtaining some kind of forbearance for himself. See *supra* at 3-4. Although the Kansas Supreme Court found the erroneous failure to sever the guilt phase harmless by itself, Reginald Carr's antagonistic portrayal of Jonathan Carr's culpability must be considered when assessing the effect of the further erroneous failure to sever the penalty phase.

In addition, "an appellate court is ill equipped to evaluate the effect of a constitutional error on a sentencing determination. Such sentencing judgments, even when guided and channeled, are inherently subjective." *Satterwhite*, 486 U.S. at 262. See *id.* ("[b]ecause of the moral character of a capital sentencing determination and the substantial discretion placed in the hands of the sentencer, predicting the reaction of a sentencer to a proceeding untainted by

constitutional error on the basis of a cold record is a dangerously speculative enterprise."); *Zant*, 462 U.S. at 885 (although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.").

IV. THE JURY INSTRUCTIONS CREATED A REASONABLE LIKELIHOOD THAT JURORS WOULD FAIL TO CONSIDER MITIGATING CIRCUMSTANCES.

The jury instructions in this case failed to inform the jury that Jonathan Carr was not required to meet any particular burden of proof in order for the jury to weigh his mitigation evidence against the State's aggravating factors. Instead, the instructions repeatedly emphasized the "beyond a reasonable doubt" standard, even though that standard applies only to the State's evidence of aggravating circumstances, not to defendant's mitigation evidence. As a result, they created "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant [mitigation] evidence." See *Boyde*, 494 U.S. at 380; *Mills*, 486 U.S. at 383-84.

This argument is presented in full in the briefs of Sidney Gleason and Reginald Carr. Rather than burdening the Court with duplicative briefing on this issue, we incorporate those arguments by reference here. Below, we briefly address certain distinctions between the instructions and arguments in this case and those in Mr. Gleason's case, which only serve to support the arguments made there.

The specific instruction on mitigating circumstances in Jonathan Carr's case (Instruction No. 8) includ-

ed the following vague language: "[i]n this proceeding, you may consider sympathy for a defendant." Pet. App. 573. This sentence says nothing about the burden of proof, and adds nothing to the instruction (present in both cases) that the "appropriateness of exercising mercy" can itself be a mitigating factor. See *id.* The State emphasizes that this instruction also told the jurors they could "consider as a mitigating circumstance" both the listed factors and "any other factor which you find may serve as a basis for imposing a sentence of less than death." Pet'r Br. 57 (emphasis removed). But (as in Mr. Gleason's case) this merely informs the jury that "any ... factor" can *qualify as* a mitigating circumstance; it does not address how the jury can determine *which* ostensible mitigating factors can be "found to exist" and thus weighed against the aggravating circumstances, as the other instructions require. See Pet. App. 571.

The other noteworthy difference in the instructions was the addition of the following sentence in Instruction No. 2: "[i]f any statements are made regarding the law of the case that are not set out in these instructions of law, such statements should be disregarded." Pet. App. 567. Again, this tells the jury nothing about the burden of proof. Insofar as it is relevant, this sentence serves only to contravene the State's claim that the parties' arguments would have helped clarify the standard of proof applicable to mitigation evidence, see Pet'r Br. 58, since the jury was told to "disregard" arguments inconsistent with the instructions themselves.

In any event, the prosecutor's arguments did not clarify the applicable standard of proof. The State emphasizes that the prosecutor told the jury that mitigating circumstances can include anything the jury deems to extenuate or reduce culpability. See Pet'r

Br. 58. But again, informing the jury that any fact can serve as a mitigating circumstance does not make clear the standard the jury should apply in deciding that a specific mitigating factor can—or cannot—be "found to exist." In this respect, the prosecutor's argument adds nothing to the instructions.

Elsewhere, the prosecutor's arguments were affirmatively damaging to the jury's proper understanding. The prosecutor told the jury that the defendants had "to prove" mitigating circumstances, which naturally suggests to the jury that mitigating evidence must meet a standard *of proof*. See, *e.g.*, J.A. 62 (Tr. Vol. 41A at 10-11) ("mitigators" are "whatever [the defendants] choose to prove to show or lessen or to change [their] culpability "). The prosecutor then referred explicitly to a "threshold" that mitigating evidence must meet: "jurors as officers of the court are sworn to follow that law [and impose death] if they find that the evidence that's presented by the State has shown that any mitigating circumstances don't rise to the threshold of mitigating that which has occurred." *Id.* at 62-63 (Tr. Vol. 41A at 10-11). This argument manages to link the State's evidentiary burden—beyond a reasonable doubt, as the jury has been told repeatedly—to some otherwise-unspecified "threshold" that mitigation evidence must clear. It thus compounds the instructions' misleading effect.

Finally, as in Mr. Gleason's case, the unchallenged introduction of mitigation evidence, by itself, establishes nothing, because the question here is not whether the jury thought it could *consider* the mitigating evidence that was introduced (as was true in *Boyde*, 494 U.S. at 383–84), but rather what burden of proof that evidence was to be measured against. Further, as the State concedes, the parties here did

genuinely dispute the existence of at least one mitigating circumstance: whether both Carr brothers suffered from brain abnormalities. See Pet'r Br. 60. The Carrs presented expert testimony that PET scans of each brother's brain revealed abnormal brain function. Tr. Vol. 42, at 69-99. The State's rebuttal witness took the position that the PET scans revealed normal brains. Tr. Vol. 46, at 58-90. In light of what the State admits was "a battle of experts" as to the *existence* of a particular mitigating circumstance, Pet'r Br. 58, there can be no question that the State directly challenged the Carrs' ability to—in the prosecutor's words—"prove [something]" that "lessen[s] [their] culpability," J.A. 62 (Tr. Vol. 41A at 10-11); see *id.* at 400-01 (Tr. Vol. 46 at 140)(prosecutor arguing that the evidentiary "foundation of this sympathy and abuse [mitigator] . had . disappeared."). That challenge directly implicates the applicable standard of proof for mitigation evidence.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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